House Calendar No. 116

99TH CONGRESS *2d Session*	HOUSE OF REPRESENTATIVES	REPORT 99-462

PROCEEDINGS AGAINST RALPH BERNSTEIN AND JOSEPH BERNSTEIN

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REPORT

OF THE

COMMITTEE ON FOREIGN AFFAIRS

together with

SEPARATE, ADDITIONAL, AND DISSENTING VIEWS

U.S. GOVERNMENT PRINTING OFFICE
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JANUARY 21, 1986.—Referred to the House Calendar and ordered to be printed

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Mr. FASCELL, from the Committee on Foreign Affairs, submitted the following

REPORT

together with

SEPARATE, ADDITIONAL, AND DISSENTING VIEWS

INTRODUCTION

In closed hearings on December 11 and 12, 1985, the Subcommittee on Asian and Pacific Affairs questioned two witnesses, Ralph Bernstein, a nonlawyer who works extensively in real estate investment, and his brother Joseph Bernstein, a lawyer who assists with that investment. The questions concerned investment work allegedly performed by them on behalf of President Ferdinand Marcos of the Philippines and his wife, Imelda Marcos. That subcommittee was pursuing allegations of vast holdings by the Marcoses in the United States, part of a flight of capital from the Philippines that has been reportedly estimated at over $10 billion in recent years. Such investments would have serious implications for U.S. foreign policy and the U.S. aid program for the Philippines.

The two witnesses, alleged to be at the center of a web of dummy corporations shielding the Marcos' holdings, firmly refused to answer the subcommittee's questions about their investment work, or even to state whether they knew or had met the Marcoses. Their refusals to answer denied the subcommittee information that is crucial to its investigation.

Ralph and Joseph Bernstein presented a number of legal claims, chief among which was the assertion that they could not give information on any relationship between them and the Marcoses because of attorney-client privilege. The subcommittee gave these

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claims every possible consideration. Its chairman and ranking m
nority member heard the counsel for the witnesses informally, ar
the subcommittee reviewed thei- legal memoranda carefully. In i
executive session hearings, it heard repeated oral presentations c
the witnesses' behalf over a 2-day span. After due consideratio
the subcommittee overruled these claims, and, when the witness
continued their resistance, held the witnesses to be in contempt
Congress, based on the legal advice of the general counsel to th
Clerk of the House, and the minority counsel of the House, tha
the claims were without merit.

For the House of Representatives not to pursue all legal steps
vindicate its right to this information would undermine severe
this investigation of the Marcos' holdings. More important,
would cast grave doubt on the credibility of, and precedents fo
other House investigations. Accordingly, the subcommittee voted
report the contempts to the committee, and the committee voted
report to the House a contempt resolution for the Bernsteins. Upo
adoption by the House, the resolution would direct the Speaker
turn the matter over to the U.S. Attorney for prosecution in a
cordance with the statutory provision for contempt of Congress,
U.S.C. section 192. That offense carries a maximum sentence of
year in prison, plus fines.

Facts, Background, and Chronology

CONGRESSIONAL INTEREST IN THE PHILIPPINES

The Subcommittee on Asian and Pacific Affairs has been co
ducting an investigation of allegations of major investments b
Philippines President Ferdinand Marcos and his wife, Imelda
Marcos, in real estate in the United States. This investigation fo
lows the strong interest of the subcommittee and committee in th
Philippines, manifested in the course of consideration of foreign a
legislation, other kinds of legislation, and oversight regarding th
Philippines generally in recent years. Concerning foreign aid, eac
year the subcommittee has conducted in-depth oversight of th
matters concerning the Philippines.[1] Key aspects of the mo
recent foreign aid bill relating to the Philippines developed fro
the provisions reported by the subcommittee and committee, as r
flected by the committee report on the foreign aid bill and the co
ference report on that bill.[2]

Last year's foreign aid bill included a specific provision, sectio
901(a) [99 Stat. 266], linking future foreign aid to the Philippine
with progress toward a number of specified goals. The provisio
stated that "the Congress affirms its intention to grant future a
to the Philippines according to the determination of the Co

---

[1] See Foreign Assistance Legislation for Fiscal Year 1985 (Part 5): Hearings and Mark
Before the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign A
fairs, 98th Cong., 2d sess. 18-23, 93-94, 124-25, 325-60 and elsewhere *passim* (1984); Foreign A
sistance Legislation for Fiscal Years 1986-87 (Part 5): Hearings and Markup Before the Subco
mittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs, 99th Cong.,
sess. XXXVI-XXXIX, 4-5, 11-15, 87-89, 98-101, 124-25, 455-536, 541-647 and elsewhere *pass*
(1985).

[2] International Security and Development Cooperation Act of 1985, H. Rept. No. 34, 99
Cong., 1st sess. 100-01 (1985) (committee report); International Security and Development Co
eration Act of 1985, H. Rept. No. 237, 99th Cong., 1st sess. 151-52 (1985) (conference report).

gress that * * * sufficient progress is made by the Government of the Philippines" toward a number of goals, one of which was "implementing structural economic reforms and a strengthening of the private sector, including elimination of corruption and monopolies. * * *" To implement that provision, section 901(c) [99 Stat. 267] provided:

> *Congressional oversight.*—The Congress, in determining future aid levels for the Philippines, will take into account not only our military bases agreement with that country, but also the extent to which the objectives and goals specified in subsections (a) and (b) have been implemented. * * *

Thus, the legislation required that congressional oversight be conducted to provide the information necessary regarding the Philippines for future foreign aid legislation.

Not only the American aid program, but also other important legislation has developed from the congressional interest in the Philippines.[3] Besides the investigations and oversight in connection with the aforementioned hearings, reports, bills, and concurrent resolutions, the committee and subcommittee have employed a variety of other oversight efforts regarding the Philippines.[4] Concerns which have played an important part in these legislative and oversight proceedings have been addressed by the subcommittee chairman on a number of occasions,[5] particularly as they may tend to affect the larger movement of events in the Philippines and relations between the Philippines and the United States.[6]

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[3] For example, in 1983, the Congress adopted H. Con. Res. 187, 98th Cong., 1st sess., calling for an impartial investigation of the assassination of Benigno Aquino. See The Consequences of the Aquino Assassination: Hearing and Markup Before the House Committee on Foreign Affairs and its Subcommittee on Asian and Pacific Affairs, 98th Cong., 1st sess., (1984).

In November 1985, the Congress adopted H. Con. Res. 232, 99th Cong., 1st Sess., a "bipartisan and bicameral resolution [which] expresses the sense of the Congress with respect to the importance of bringing about a restoration of democracy in the Philippines," 131 Cong. Rec. H10209 (daily ed. Nov. 14, 1985) (Representative Solarz). As two of its predicates, H. Con. Res. 232 declared that "the Philippines is of vital importance to U.S. security" and that "the Republic of the Philippines is experiencing serious political, economic, and security problems which directly threaten the stability of the country. * * *" 131 Cong. Rec. H10211 (daily ed. Nov. 14, 1985).

[4] For example, in response to the committee's interest, the Comptroller General compiled an indepth report, "Economic Support Fund Assistance to the Philippines," GAO/NSIAD-84-44 (1984). A number of staff and Member studies have also been conducted on various aspects of Philippine affairs. Among the many issues explored in legislative and oversight proceedings have been allegations concerning corruption and the flight of capital from the Philippines. See, e.g., Foreign Assistance Legislation for Fiscal Years 1986-87 (Part 5): Hearings and Markup Before the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs, 99th Cong., 1st sess. 635 (1985) (testimony by Hon. Paul D. Wolfowitz, Assistant Secretary of State for East Asian Affairs and by Hon. Charles W. Greenleaf, Jr., Assistant Administrator, Bureau for Asia, Agency for International Development, in response to inquiry by Representative Solarz concerning capital flight from the Philippines).

[5] For example, as published in the Congressional Record, Representative Solarz has written:

> President Marcos' power base has now shrunk to the point where his support is largely restricted to his own family, a handful of close associates, and a few favored military and political appointees. The vir[tu]ally complete collapse of confidence in his regime can be traced to several factors. A principal cause has been the system of "crony capitalism" he has established to enrich his political allies. Perfecting the art of politically connected plunder to a degree undreamed of by President Mobutu of Zaire and other expert practitioners of the trade, Ferdinand Marcos and his associates have directed millions of dollars from critical development needs for their private purposes.

131 Cong. Rec. E1668 (daily ed. Apr. 23, 1985) (reprinting article by Representative Solarz).

[6] "To a very large extent it is the decline in the economy of the Philippines, and the growing i[m]poverishment of the people of the Philippines, which is a significant source of strength for the Communist-dominated challenge to the government of that country. * * *"

Continued

ALLEGATIONS REGARDING THE MARCOS' HOLDINGS

The particular allegations currently under investigation have been reported in articles in a number of publications, including the New York Times, the Wall Street Journal, the Washington Post, the San Jose Mercury News and the Village Voice. The articles were reprinted in the Congressional Record, 131 Cong. Rec. S15126-15143 (daily ed. Nov. 7, 1985), in connection with a proposed concurrent resolution regarding elections in the Philippines and were made part of the hearing record of this current investigation. The alleged investments, if substantiated, have major implications for American policy.

At this stage, the subcommittee has not resolved the truth of the allegations or their implications—in fact, the very point of this contempt report is that the witnesses' recalcitrance has denied Congress information of great importance regarding those allegations. However, the subcommittee has compiled a sufficient record to conclude that these witnesses do have invaluable information to provide regarding the allegations concerning the Marcos' holdings and, thus, a discussion of the allegations is essential to understanding what the subcommittee sought and why it sought it.

The allegations are, first, that the Marcoses have acquired—directly or indirectly—a number of highly expensive real estate properties in the United States, which are controlled through a web of corporations. A New York Times article of August 14, 1985, reprinted in 131 Cong. Rec. S15133 (daily ed. Nov. 7, 1985), reporting on an impeachment complaint filed in the Philippines against President Marcos, detailed some of the allegations:

> The complaint listed a dozen properties that, the opposition says, are owned by the Marcos family, either directly or by proxies. The property list was a mixture of previous allegations and new ones. The Government has denied that President Marcos and his wife, Imelda, have any sizable investments outside [the] Philippines.
>
> The complaint charged, for example, that in 1981, Mrs. Marcos bought the Crown Building in Manhattan, an office tower on Fifth Avenue and 57th Street, valued at $51 million under the name of a Netherlands Antilles holding company, Lastura N.V. Later, the compl[ai]nt states, the property was transferred to another holding company owned by Mrs. Marcos, the Canadian Land Company.
>
> Also in 1981, the complaint said, Mrs. Marcos bought property on Long Island known as the Lindenmere Estate.
>
> Among other properties, the complaint said, Mrs. Marcos owns a six-story townhouse in Manhattan at 13 East 66th Street, a $104 million highrise commercial building at Seventh Avenue and 57th Street, an $18 million mansion in London and a $20 million estate in Rome. In some cases, the document said, close friends of the Marcos family made the purchases on her behalf.

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131 Cong. Rec. H5283 (daily ed. July 9, 1985) (statement by Representative Solarz during floor debate on foreign aid bill).

Second, the allegations are that the two recalcitrant witnesses, Ralph Bernstein, a nonlawyer expert in real estate investment, and Joseph Bernstein, a lawyer who is an officer in a real estate company and a partner in the New york firm of Bernstein, Carter & Deyo, initially made, subsequently have controlled, and currently continue to control, many investments on behalf of the Marcoses.[7] An article in the San Jose Mercury News, reprinted in 131 Cong. Rec. S15142 (daily ed. Nov. 7, 1985), described some of these alleged links:

> In the forefront of many transactions involving powerful Filipinos are a handful of real estate agents and several prominent lawyers and law firms in the United States. * * *
>
> Bernstein, Carter & Deyo, a New York law firm that has represented Mrs. Marcos in two documented real estate deals and according to Philippine banking and business sources has handled other purchases of office buildings and a department store in New York City for the Marcoses.
>
> The firm's senior partner is Joseph E. Bernstein, a Hillsborough native and self-described expert on offshore real estate investment in the United States. * * *
>
> Bernstein has family ties to the Philippines and acknowledged that his law firm "from time to time might get somebody with a Philippine connection."
>
> According to New York real estate records, a company Bernstein heads, the New York Land Co., has handled the purchase of several office buildings in New York by Netherlands Antilles corporations. One building in particular, the $51 million Crown Building in Manhattan, has been singled out by several Filipino business and banking sources as having been bought and sold for Imelda Marcos.
>
> The Mercury News found that it was bought in 1981 by Lastura N.V., a Curacao corporation, and later was transferred to another Curacao firm, Canadian Land Co. of America N.V., which is managed by Bernstein. That firm is controlled by a third Curacao firm, Caribbean Management N.V. The offices of Lastura and Canadian Land are in the same suite as the offices of New York Land.
>
> Bernstein denied that he represents Mrs. Marcos.
>
> "I don't know her," he said, declining to discuss the identities of his clients. "I wish I did. Everybody thinks I do * * * Send her my way."

Finally, there is a third allegation, on which there is no dispute because the Bernsteins confirmed it in their testimony. The Bernsteins receive hundreds of thousands of dollars a year to perform their services, particularly on behalf of foreign clients, under the

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[7] Counsel have represented that Ralph Bernstein formerly worked for Bernstein, Carter & Deyo and currently is a client of the firm with interests in common with those of the clients on whose behalf privilege is assertedly being claimed.

arrangement that they will not reveal the identities of those clients.[8]

To investigate the allegations, the subcommittee took a number of steps. Among others, on December 3, it voted to subpoena Ralph and Joseph Bernstein, along with William Deyo, a partner of Joseph Bernstein in the firm of Bernstein, Carter & Deyo. Those subpoenas, which were served by U.S. Marshals several days later, required production of documents relating to the properties and companies allegedly linked to the Marcoses and required the individuals to appear and testify before the subcommittee on December 11.

From the outset, the witnesses manifested an intention to resist the subcommittee's demands for information. This resistance was conducted respectfully, through presentation of their legal position; there was no witness disrespect or disruption, apart from the refusals to provide information. However, those refusals, while couched respectfully, were absolutely firm on the critical points, and neither repeated requests by the subcommittee for the witnesses to reconsider, nor the application of legal compulsory process, budged them from that resistance.

The subcommittee gave the witnesses every opportunity to make their case as to why they should not have to provide the information. These witnesses retained well-respected counsel to present their case. The chairman and ranking minority member of the subcommittee afforded these counsel an informal meeting lasting for 3 hours on December 10, to allow counsel to make a full preliminary presentation of the witnesses' position. Those counsel also met with the offices of other Members and circulated among the Members a legal memorandum setting forth their position at length. On December 11, the subcommittee commenced its hearing regarding the Bernsteins in executive session. The Bernsteins refused to answer a number of questions, claiming various privileges as discussed below. Again, their counsel presented their position at length, their written submissions were made a part of the record, and they were given a full opportunity by the subcommittee to be heard.

Although the witnesses declined to answer questions, the subcommittee held off on proceeding toward contempt during lengthy questioning lasting all afternoon and into the evening. In the face of continued refusals to provide information, the subcommittee did not overrule the witnesses' objections, in order that all their claims could be fully and fairly aired prior to reaching a contempt situation. During that preliminary questioning, and at the end, the subcommittee heard from the general counsel to the Clerk, Steven R.

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[8] As the opening statement on behalf of the three witnesses explained, their work

> emphasize[ed] the specialty [they] had developed in foreign investment in the United States * * * and [they] now represent clients from several nations in connection with business activities both in the United States and in other countries. * * *
>
> A desire to preserve privacy and to maintain confidentiality as to the nature of business activities is a common incident of representation of domestic and foreign investors.

With specific reference to the matters under investigation, the Crown Building in New York City, and the Canadian Land Co., are allegedly tied ultimately to the Marcoses. Joseph Bernstein testified that while the Crown Building was owned by the Canadian Land Co. (whose stockholders he declined to disclose), the property had as its managing agent the New York Land Co. Joseph and Ralph Bernstein respectively testified that each of them was paid a salary of $144,000 by the New York Land Co.

Ross, and the minority counsel of the House, Hyde Murray. Both advised that the witnesses' claims be overruled, based on legal reasoning summarized in a written memorandum appended to this report. Finally, at the end of that long hearing, the chairman of the subcommittee overruled the witnesses' claims and ordered and directed that the witnesses answer the subsequent questions.

At this point, prior to an actual contempt situation, the witnesses requested deferral of final questioning for another day. Although this request was not expected and created significant burdens for the subcommittee, the subcommittee agreed to recess until the next morning. The subcommittee then made available to the witnesses the questions it intended to ask the next day—an extraordinary effort by the subcommittee to be of assistance to the witnesses, going far beyond what virtually any other congressional investigation would do—to give the witnesses every opportunity to review the questions in private with their counsel, to reevaluate their legal situation, and reconsider their refusals to testify.

Finally, on the morning of December 12, the subcommittee reconvened. Again, it heard a lengthy statement by counsel for the witnesses. It then propounded the questions that had been provided to the witnesses. The witnesses answered a few of the questions but continued to refuse to provide information on the key points. At this point, the subcommittee excused the witnesses, again heard from, and questioned, the general counsel to the Clerk and minority counsel of the House—who advised, again, that the claims of privilege were not well taken—and debated whether to hold the witnesses in contempt.

The chairman, with the subcommittee's concurrence, held in abeyance the question of contempt for William Deyo. Although Deyo had declined to provide information concerning the Marcos' holdings, he had given a number of answers indicating what he did not know and what he had not done. These negative answers suggested Deyo's role included a much lesser degree of involvement in the alleged Marcos' investments, and the subcommittee concluded that it was not necessary, at this time, to press the matter regarding him. The matter of documents that had been withheld was continued to a later date, to await more concrete decisions by the subpoena respondents on what they were providing and what they were withholding. The subcommittee then voted 6–3, by identical recorded rollcall votes for each witness, to report contempt resolutions for Joseph Bernstein and Ralph Bernstein to the full committee:

Mr. Solarz	Aye	Mr. Leach	Aye
Mr. Dymally	No	Mr. Roth	No
Mr. Torricelli	Aye	Mr. Solomon	No
Mr. Udall	Aye	Mr. Bereuter	Aye
Mr. Gejdenson	Aye		

On December 17, the full committee debated the matter for several hours. It made the executive session transcripts at which the key testimony had occurred available to the witnesses and for the

purposes of the committee's action. Besides the debate among the Members, the committee heard from the general counsel to the Clerk, the minority counsel of the House, and counsel for the witnesses. The committee then voted 21–2, by identical recorded roll call votes for each witness, to report a contempt resolution for Joseph Bernstein and Ralph Bernstein to the House:

Mr. Fascell	Aye	Mr. Broomfield	Aye
Mr. Yatron	Aye	Mr. Gilman	Aye
Mr. Solarz	Aye	Mr. Lagomarsino	No
Mr. Bonker	Aye	Mr. Leach	Aye
Mr. Wolpe	Aye	Mr. Snowe	Aye
Mr. Gejdenson	Aye	Mr. Solomon	No
Mr. Kostmayer	Aye	Mr. Bereuter	Aye
Mr. Torricelli	Aye		
Mr. Smith	Aye		
Mr. Berman	Aye		
Mr. Reid	Aye		
Mr. Levine	Aye		
Mr. Feighan	Aye		
Mr. Weiss	Aye		
Mr. Ackerman	Aye		
Mr. Garcia	Aye		

Authority and Legislative Purpose

The witnesses did not contest the authority and valid legislative purpose of the investigation, or the pertinency of any of the questions on which contempt occurred. These are established clearly in the record and extensive discussion is unnecessary. While the subcommittee indicated a number of other legislative purposes, the chairman summarized part of the subcommittee's authority and purposes at one point:

> Pursuant to House Rule X, clause 1(i), the Committee on Foreign Affairs has jurisdiction and responsibility regarding "Relations of the United States with foreign nations generally."
>
> Pursuant to the Committee on Foreign Affairs' Committee Rule 14(b)(B), this subcommittee, as the regional subcommittee with jurisdiction over Asian and Pacific Affairs, has jurisdiction and responsibility regarding "Matters affecting the political relations between the United States and other countries and regions," and "Identification and development of options for meeting future problems and issues relating to U.S. interests in the region."
>
> Pursuant to these rules, this subcommittee considers and makes legislative recommendations on aid requests of the Philippine government. Currently, for example, this [s]ubcommittee is conducting oversight over whether aid to the Philippines should be reduced. The alleged investment by members of that government of large sums in United States real estate, allegedly performed by and through

these witnesses, falls directly within that jurisdiction and responsibility.

Claims of the Witnesses Who Refused To Answer

REFUSALS TO ANSWER

Attached to this report as an appendix is a transcript excerpt for the witnesses' refusals to answer. To summarize, Ralph Bernstein, the nonlawyer real estate investment adviser, refused to answer questions with respect to either President or Imelda Marcos such as:

Do you know either?

Have you met either?

Did you meet either on your 1982 trip to the Philippines?

Have you located real estate properties for either?

Have you acquired real estate properties for either?

From your business activity—locating and acquiring real estate properties, and so on—do you know if either has any interest in Crown Building?

From your business activity, do you know if either has any interest in Herald Center?

From your business activities, do you know any investments by the Marcos family in the United States?

Joseph Bernstein, the lawyer who assists in the real estate investment activity, refused to answer such questions with respect to either President or Imelda Marcos as:

Do you know either?

Have you met either?

Have you ever had any business dealings with either?

Have you located any real estate properties for either?

Have you acquired any real estate properties for either?

Have you provided any real estate or financial advice to either?

Have you drafted any leases or mortgages for either?

Who were the shareholders of Canadian Land Co.?

When did the shareholders of Canadian Land Co. first become shareholders of it?

Was there any change of ownership when the name was changed?

Are any shareholders Filipino?

Has any money to purchase or renovate the Crown Building come from the Philippines?

Do they have any interest, direct or indirect, in Lastura, N.V. or Canadian Land Co.?

Are you acting directly or indirectly for any other principal in your capacity as director of Canadian Land Co.?

Do they have any direct or indirect financial interest in the Crown Building?

A number of questions concerned business, rather than legal activity. The witnesses and their counsel made protestations that their work was legal. However, having been given numerous opportunities to raise their objections and to make their case, including providing written submissions as well as oral statements, the Bern-

steins made no effort to establish that their services were legal rather than business in nature.

CLAIMS OF THE WITNESSES

The witnesses' basic claims are set forth in their legal memorandum attached to this report. Other articulations by the witnesses and their counsel of their claims are preserved in the record of this hearing, and the witnesses were assured by the subcommittee that all such claims are preserved and incorporated by reference in their refusal to testify.

To summarize, the witnesses' basic claims are threefold. First, they contended that they needed more time to review their records, in order to determine whether they had to refuse to answer. Second, and most important, they claimed attorney-client privilege. Third, they asserted requirements imposed by the bar for preservation of secrets and confidences. With regard to these claims, they contended that answers would subject them to disbarment and lawsuits. Each claim will be addressed in turn.

CLAIMS REGARDING TIMING

The witnesses claimed that they needed more time to review their records. In the particular facts and circumstances of this hearing, this claim was without merit. The witnesses were subpoenaed the week before the hearings, with subpoenas for documents that gave ample advance notice that the subject of the hearings would be the Marcos' holdings. When they appeared in response to those subpoenas, the overwhelming majority of the questions on which they were held in contempt were extremely simple and straightforward questions involving their contact with the Marcoses and the most elementary knowledge of their holdings. In the subcommittee's judgment, no review of their documents was required for them to answer the questions.[9] The witnesses made an overall claim regarding time, rather than a particularized claim that one or another specific question involved some particular point that required checking.

Finally, it was clear that the witnesses would not answer any questions relating to the allegations that they had made major investments on the Marcos' behalf. The courts have accepted much shorter times in congressional investigations than were involved here—see, for example, *United States* v. *Kamin*, 136 F. Supp. 791, 793–94 (D. Mass. 1956), where it was clear, as here, that the witnesses' refusals covered whole lines of questioning and that a delay in the proceedings, such as to check details, would therefore not produce any major change in the eventual result.

CLAIM REGARDING ATTORNEY-CLIENT PRIVILEGE

The subcommittee devoted much time to hearing the witnesses' attorney-client privilege claim, and the response of the general

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[9] As for the witnesses' request for more time to respond fully to the demand for documents themselves, based on assertions as to the number of documents to be searched in order to provide that full response, the subcommitee granted a continuance until Jan. 15, 1986, subject to certain terms and conditions.

counsel to the Clerk and the minority counsel of the House, summarized in memoranda appended to this report. It eventually decided to overrule that claim, for the reasons set forth orally and in writing by the general counsel and the minority counsel. Those reasons may be summarized under two headings in abbreviated fashion as follows.

First, the witnesses—one nonlawyer real estate investment expert who has, in the past, been associated with a law firm, and one lawyer who assists in that investment activity—sought to claim attorney-client privilege on business and personal activity for which, even in questioning by the courts, such a privilege would not be recognized. Courts recognize the privilege only for a client's communications seeking legal advice from a professional legal advisor acting in that capacity, and apply it only to communications regarding action in that capacity. "Thus, where the attorney acts as business advisor or collection agent, gives investment advice, or handles financial transactions for his client, the communications between him and his client are not protected by the privilege." In re *Shapiro,* 381 F. Supp. 21, 22 (N.D. Ill. 1974) (footnotes omitted).

In a recent case, documents were supoenaed by a grand jury from an attorney regarding real estate property purchases. The attorney had represented two undisclosed principals. The subpoena required all the business records of the pertinent real estate company, all the records concerning the purchase and sale of the properties, and "direct(ed) petitioner (the attorney) to testify before the grand jury regarding his knowledge of the business affairs of XYZ Realty, Inc. (the pertinent real estate company)." In re *Application of John Doe, Esq.,* 603 F. Supp. 1164, 1167 (E.D.N.Y. 1985). Among the specific questions that were to be answered in that questioning was one parallel to the key one for the subcommittee's hearing: "Who funded XYZ; (a) How much cash was put into the corporation; (b) Who funded the corporation." Id. at 1167 n.1. The district court held the attorney-client privilege inapplicable: Some of the document "categories [were] unprivileged because they relate[d] to business, not legal, advice," others were unprivileged because they related to "petitioner's fee arrangements with his clients." Id. at 1167. The questions "appeared to seek answers concerning only business advice which, though perhaps intended to be private, most certainly were not privileged." Id.

Of course, the burden is always on those who would claim a privilege. See, e.g., *Shapiro,* 381 F. Supp. at 22. Here, the record makes apparent that the witnesses failed to sustain that burden, and failed to rebut the strong indications that they were conducting investment activity, not just providing legal advice, to the Marcoses. For Ralph Bernstein, the nonlawyer real estate investment expert, the situation is patent. He attempted to claim privilege regarding such questions as whether he had located or acquired real estate properties for the Marcoses. If attorney-client privilege covered the real estate investment activities of nonlawyer real estate experts, simply because of their present or past association with law firms, the courts would quickly find the ability of the law to police real estate activity reduced to a nullity.

Joseph Bernstein's situation is no different. For example, he claimed privilege regarding whether he had located or acquired

real estate properties for the Marcoses, or provided them with real estate or financial advice. He refused to answer questions about the Canadian Land Co., a dummy corporation of which he is admittedly a director, which allegedly is a front for the Marcos' holdings—questions regarding changes in its ownership, who were the shareholders, or when they became shareholders. The *Doe* case, which reflects longstanding law, simply makes a claim of privilege untenable for such questions.

Furthermore, even for attorneys, unlike Joseph Bernstein, engaged purely in the practice of law rather than business, it is the general rule that the identity of an attorney's clients is not privileged. This point of law was conceded by the witnesses. Whatever exceptions may exist in limited circumstances, this matter was not one of them.

It became clear to the subcommittee that the witnesses were withholding the information pursuant to an arrangement that they will not reveal or confirm for whom they perform their investment services. That arrangement may be profitable, but it is not a sufficent basis for precluding the subcommittee from investigating the Marcoses' holdings in this country.

A second basis, separate and independent, for overruling the claim of privilege was proposed to the subcommittee by the general counsel to the Clerk, involving invocation of Congress' full constitutional investigatory authority. That second basis is set forth here, followed by the committee's conclusions regarding it. That second basis is that the Congress has taken a limited view as to the applicability of attorney-client privilege. Congressional committees have entertained, as a matter of discretion, claims of such privilege. However, where in the particular circumstances an investigation determines that the legislative need for the information outweighs the arguments against production, such production has been required. In this situation, as described above, the underlying claim is attenuated by the "business" nature of the information sought.[10] The precedents of the House and the appropriate judicial precedents thus support rejection of the claim of privilege.

The historical position of the Congress in this matter may be set forth briefly. Congress' power to investigate derives inherently from its power to legislate, as modeled on Parliament's power. At common law, while the English courts were bound by attorney-client privilege, Parliament was not. As Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, relied on by the Supreme Court as a guide to parliamentary and congressional investigatory authority,[11] specifically notes:

> A witness is, however, bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has

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[10] While the witnesses asked the subcommittee to obtain the information some other way, they never offered, from their knowledge of the matters under investigation, a concrete suggestion of any kind, let alone one that comported with the investigation's needs.

[11] See, e.g., *McGrain* v. *Daugherty*, 273 U.S. 135, 161 & n.15 (1927) ("power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament. * * *") (citing "May's Parliamentary Practice, 2d ed., pp. 80, 295, 299").

> taken an oath not to disclose the matter about which he is required to testify, *or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client* * * * some of which would be sufficient grounds of excuse in a court of law.

May's Treatise at 746–47 (20th ed. 1983).

Consistently, congressional committees have acted on their authority to reject the applicability of claims of attorney-client privilege. Such rejections, in both the 19th century [12] and the 20th century,[13] have occurred in incidents widely noted both for the investigations themselves, and the ensuing litigation. No case ever denied congressional committees the authority claimed, or reversed the contempt involved. In recent years, the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce has repeatedly rejected—based on extensive research by the Library of Congress—claims of attorney-client privilege.[14] Both the House and the Senate have failed to adopt proposals to specifically incorporate a privilege respecting attorney-client confidences in their Rules.[15]

The general counsel to the Clerk has further noted that this history reflects the well-known bases in the law for the derivation of privileges. Apart from those specific privileges created by the Constitution, such as the fifth amendment privilege against compulsory self-incrimination,[16] which all the branches follow, the privileges applicable to judicial and legislative proceedings arise from policy determinations by the lawmaker empowered to make those policy decisions. For legislative proceedings, Congress makes those

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[12] In the 19th century, the House conducted a notable investigation into the financing of the Union Pacific Railroad and the activities of the Credit Mobilier. The House held Mr. Joseph B. Stewart, counsel for the Union Pacific Railroad, in contempt notwithstanding his assertion of attorney-client privilege. See *Stewart* v. *Blaine*, 1 MacArthur 453 (D.C. 1874) (dismissing Stewart's suit for false imprisonment against Speaker Blaine) and Eberling, Congressional Investigations 349–50 (1928). "During the [Credit Mobilier inquiry], Joseph B. Stewart, counsel for the Union Pacific, declined to answer the committee's questions on the ground that to do so would violate the confidential relationship between himself and his client, the railroad. Unimpressed, the House locked him up in a room at the Capitol." T. Taylor, Grand Inquest: The Story of Congressional Investigations 45 (1955).

[13] In the 20th century, a famous investigating committee led by Senator (later Justice) Hugo Black subpoenaed the books and records relating to certain mail contracts from an attorney, William P. MacCracken, Jr. MacCracken claimed attorney-client privilege and testified before the committee in support of that claim, but "[u]pon the conclusion of MacCracken's testimony on February 2, the Committee decided that none of the papers in his possession could be withheld under the claim of privilege." *Jurney* v. *MacCracken*, 294 U.S. 125, 146 (1935). The Senate learned that MacCracken had allowed some of the documents under subpoena to be destroyed, and he was held in contempt of Congress. The Supreme Court affirmed the contempt. Id. at 152. The contempt case focused on the destruction of documents rather than the claim of privilege, and so it did not produce a definitive judicial discussion of the claim of privilege; as the Court noted, "[t]he claim of privilege hereinafter referred to is no longer an issue." Id. at 144.

[14] See Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress (Committee Print 1983); see also Hearings on the International Uranium Cartel before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st sess. (1977) (vol. I).

[15] See Senate Report No. 2, 84th Cong., 1st sess. 27–28 (1954); H. Res. 178, 84th Cong., 1st sess.

[16] The witnesses made no claim of fifth amendment privilege against self-incrimination here, on their own behalf or on behalf of others. Whether hypothetical situations very different from this one might entwine the fifth or sixth amendments in attorney-client situations (such as when criminal defendants reveal incriminating information to defense attorneys), here, in this context of information sought from a nonlawyer and his associate, a lawyer, regarding real estate investments, the two are quite distinct. *Fisher* v. *United States*, 425 U.S. 391, 402–14 (1976) (sharply distinguishing the fifth amendment and attorney-client privilege in context of tax information).

determinations, through its statutes, rules of the House and Senate, and committee rules. Those statutes and rules create numerous protections for witnesses.[17] However, Congress also does not impose many restrictions on its proceedings which apply in judicial proceedings, see e.g., *United States* v. *Fort*, 443 F.2d 670, 679–80 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971), and for it to do so by applying the privileges and procedures of other kinds of proceedings would bring key congressional inquiries to a halt.[18] No statute, House rule, or Foreign Affairs Committee rule changes the English rule that attorney-client privilege did not have to be accepted in legislative proceedings; Congress has never decided to impose that restriction on its proceedings. For judicial proceedings, by contrast, the policy determination is made by the judiciary as a matter of Federal common law, and the courts define the boundaries of attorney-client privilege as they accept it.

The subcommittee overruled the claim of privilege by these witnesses on both these grounds: That the claim of privilege would not have been upheld even in a court, and that a congressional committee was obliged to decide whether to accept such claims of privilege apart from whether a court would uphold the claim. However, during debate in the full committee, several members questioned the necessity of relying on that second ground. These members received assurances by the subcommittee chairman that the claims of privilege made by these witnesses would not have been upheld even in a court, and that he would place his primary reliance on the advice of the general counsel to the Clerk in that respect. These members noted their strong preference that the committee not rely on a claim of power which was broader than necessary, and which, in their view, raised concerns about the future or about other contempt situations that they did not have to address in voting with regard the contempt that had occurred here.

In light of the concerns and preferences expressed by these members, the committee requests that the U.S. attorney, in presenting this matter, proceed primarily and strongly with emphasis on the primary ground relied on by the subcommittee, that this claim of

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[17] See, e.g., *Yellin* v. *United States*, 374 U.S. 109 (1963); *Christoffel* v. *United States*, 338 U.S. 84 (1949).

[18] To take the most obvious example, as full application of the "state secrets" privilege would bar much of the oversight conducted by the Foreign Affairs, Armed Services, and Intelligence Committees, over the conduct of the Nation's foreign affairs and defense. Parliament never imposed such a bar upon itself, nor has the Congress. To take another example, the courts have repeatedly refused to interfere with congressional investigatory probes of assertedly privileged trade secrets, noting that the judiciary "'must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.'" *FTC* v. *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (quoting *Exxon Corp.* v. *FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979)).

Notwithstanding these obvious examples, the argument sometimes put for why privileges that apply elsewhere must be applied to Congress is that if the attorney-client privilege were overruled by a congressional committee in an instance when a court would not overrule it, this would deprive the privilege of its value in general to encourage clients to confide in attorneys. Even to state this argument is to show its absurdity. The investigations by Congress of state and trade secrets have hardly even disturbed these privileges' general utility, let alone destroyed the reasons they continue to be upheld in courts. There is no more likelihoold that Congress would terminate the attorney-client privilege's usefulness by misuse of its investigatory authority than that Congress would take the considerably simpler step of amending Federal Rule of Evidence 501 to abolish the privilege in Federal cases. Few would contend that the Congress, as a historic matter, has proved antagonistic to the role of lawyers in this country or has set out to impair the practice of law. The burden is on those who would challenge the historic rule: Parliament's rule has hardly impaired the practice of law in Great Britain, nor has Congress' historic tradition, described above, impaired it here.

privilege would not have been upheld even in a court. It is the committee's expectation that this ground alone will suffice to sustain its investigation, without a need to address broader questions. The courts should find this approach preferable in any event, as it is consistent with the ancient and oft-repeated maxim that congressional contempts should apply "the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230 (1821).

CLAIM REGARDING BAR REQUIREMENTS

Finally, the witnesses claim bar requirements forbid the disclosure. They rely heavily on Legal Ethics Committee opinion No. 124 of the District of Columbia Bar, which advises the inquirer that tax lawyers should not voluntarily disclose the identity of the firm's clients to IRS auditors and should, if confronted with a summons, resist disclosure on behalf of their clients. They trace this requirement ultimately back to the rules of the bar, to some extent enacted into State statutes, to maintain what a lawyer considers to be client secrets or confidences, absent a court order.

This Ethics Committee's advisory opinion is inapposite, for several reasons. The relevant portions of the Code of Professional Responsibility do not, in fact, prohibit disclosure of client confidences absent a court order. The Code permits disclosure where "required by law or court order." See ABA Model Code of Professional Responsibility, DR 4-101(C)(2) (the Code has been adopted in both New York and the District of Columbia). Thus the "ABA Model Code * * * poses no ethical dilemmas for lawyers who are told by a law or by a court that, despite the general ethical prohibition against disclosure, they must reveal client confidences." ABA/BNA Lawyers' Manual on Professional Conduct, § 55:1201 (1984).

The witnesses contend that "Because 'voluntary' disclosure is that which has not been judicially compelled * * * *disclosure pursuant to a congressional subpoena could be considered voluntary.*" Memorandum of December 10, 1985, at 9-10 (submitted to the subcommittee by the recalcitrant witnesses' attorneys) (italics added and citations omitted). However, disclosure cannot be considered voluntary in the context in which these witnesses committed their contempt. In contrast to IRS summonses, there is no opportunity, in disobeying the considered ruling of a congressional investigation, to await a further court order before deciding whether to comply.[19] The procedure in congressional investigations has been described thusly by the Supreme Court:

> Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to pros-

[19] Opinion No. 124 is specifically tailored to one very narrow situation: An IRS audit and summons. Unlike Congress, the IRS operates under a detailed statutory framework which allows lawyers making privilege claims to await court orders rather than being bound by law to make disclosures on some other basis. While the IRS has a provision for criminal penalties for extreme instances of disobedience to summonses, 26 U.S.C. § 7210, the Supreme Court has held that "this statute on its face does not apply where the witness appears and interposes good faith challenges to the summons." *Reisman* v. *Caplin*, 375 U.S. 440, 447 (1964). Among such appropriate good faith challenges is the assertion that the matter "is protected by the attorney-client privilege." Id. at 449. Thus, the Court found that "a witness would suffer no injury" while awaiting a court order to obey the summons. Id.

> ecution under § 192. Thus, if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection. * * * In such an instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent. Or *the committee may disallow the objection* and thus give the witness the choice of answering or not. Given such a choice, the witness may recede from his position and answer the question. *And if he does not then answer, it may fairly be said that the foundation has been laid for a finding of criminal intent to violate § 192.*

Quinn v. *United States*, 349 U.S. 155, 165–66 (1955) (italics supplied).

Thus, the congressional context cannot be analogized to the IRS context. Once the Chair in a congressional proceeding overrules the objection, the period when disclosure would be "voluntary" is past.[20] Once the subcommittee overruled their objection, the Bernsteins were bound to obey its direction, and follow its ruling as a commandment of disclosure, in the words of the Code, "required by law." Their resistance to doing so was contempt of Congress.

As an entirely separate matter, it is well-established that no professional or bar association rule can override Federal law, such as the Congress' inherent constitutional investigatory power.[21] In this instance, all the facts and circumstances strongly established for the subcommittee that the witnesses did not face a realistic threat of disbarment. In fact, one witness, Ralph Bernstein, is not even a member of the bar. This subcommittee simply could not credit that any organized bar would challenge its investigatory authority to the point of punishing witnesses who, having made every possible effort to present a claim of privilege, had had their claims overruled by a congressional tribunal of competent jurisdiction with authority to certify for criminal prosecution under 2 U.S.C. § 192. It also notes that witnesses in congressional procedures have a range of statutory and common law protections which, along with obvious

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[20] In that regard, it is well to note that such memoranda as the witnesses' law firm has provided, or other legal advice, may well assist the witness in presenting an objection to the investigatory committee. However, once the Chair overrules an objection, compliance is not voluntary; such memoranda do not excuse noncompliance. Again, as the Supreme Court explains.

> There is no merit in appellant's contention that he is entitled to a new trial because *the court excluded evidence that in refusing to answer he acted in good faith on the advice of a competent counsel.* The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and §102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 85. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 49.

Sinclair v. *United States*, 279 U.S. 263, 299 (1929) (italics supplied.)

[21] Indeed, in recent years, the Supreme Court has repeatedly refused to follow bar rules found inconsistent with Federal constitutional or statutory law. See, e.g., *Supreme Court of New Hampshire* v. *Piper*, 105 S. Ct. 1272 (1985) (rule limiting bar admission to residents invalid under privileges and immunities clause); In re *Primus*, 436 U.S. 412 (1978) (bar rule restricting client solicitation by members of bar invalid under first amendment; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (bar rule banning advertising invalid under First Amendment); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) (bar associations publication and enforcement of minimum fee schedule invalid under the Sherman Act).

practical considerations, make concern about civil lawsuits far-fetched.

HOUSE RULES REQUIREMENTS

COMMITTEE ACTION AND VOTE

Pursuant to clauses 2(l)(2) (A) and (B) of rule XI, a majority of the committee having been present, the resolution recommended in this report was approved by a vote of 21 ayes to 2 nays.

COMPLIANCE WITH RULE XI, CLAUSE 2(l) (3)

(1) With reference to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, a separate hearing was held on the subject matter of this resolution by the subcommittee on Thursday, December 12, 1985.

(2) With respect to the Budget Act requirements of clause 2(l)(3) (B) and (C) of rule XI, neither is applicable as the measure reported is neither a bill nor a joint resolution.

(3) With respect to clause 2(l)(3)(D), no summary of oversight findings by the Committee on Government Operations was received.

CONCLUSION

The subcommittee properly proceeded with its bipartisan investigation of the allegations regarding the Marcos holdings. Upon due deliberation, it received the advice of the general counsel to the Clerk and the minority counsel of the House that the witnesses' claims were not well taken. In essence, the witnesses are seeking to preserve an arrangement by which they have received hundreds of thousands of dollars a year for keeping secret their real estate investment services for foreign clients. The Congress cannot accept that arrangement as a constraint on its investigatory authority.

Accordingly, the committee recommends to the House the following resolution:

> *Resolved,* That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House certify the report of the Committee on Foreign Affairs, detailing the refusal of Ralph Bernstein to answer questions of the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, to the United States Attorney for the District of Columbia, for him to be proceeded against in the manner and form provided by law.
>
> *Further resolved,* That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House certify the report of the Committee on Foreign Affairs, detailing the refusal of Joseph Bernstein to answer questions of the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, to the United States Attorney for the District of Columbia, for him to be proceeded against in the manner and form provided by law.

SEPARATE VIEWS OF HON. LAWRENCE J. SMITH

I am pleased that in its consideration of this contempt resolution, the full Committee decided to avoid the assertion that attorney-client protections applicable before judicial or administrative bodies are or may be inapplicable before the Congress. It is my understanding that the majority report will make clear the Committee's intention that the United States attorney who will be responsible for prosecuting this matter, if a prosecution becomes necessary, is not to base his case in any way on any contention that attorney-client protections may lawfully be disregarded in this or any other Congressional proceeding.

If such a proposition were to prevail, attorney-client protections could be eviscerated, and the values they are designed to serve would be made unsecure. A confidence can only be secure against disclosure if it is secure everywhere, in every forum where an attempt might be made to extract it.

If a client's confidences and secrets were not secure once given to an attorney, then there would be little meaning to the Fifth Amendment right against compelled self-incrimination, nor to the Sixth Amendment right to counsel, nor to any of the particular component Constitutional guarantees of due process.

Hence, the case against these two witnesses must stand or fall on the particular questions they declined to answer, and on the claim that normally applicable attorney-client protections do not support their refusals to testify in these instances. There appears to be no mechanism by which to test the validity of these witnesses' claims of privlege, other than through the issuance of a resolution of contempt, and ultimately, a court proceeding under 2 U.S.C. 192. Hence, I feel there is no alternative but to vote for the resolution before the Committee.

Indeed, this case demonstrates the urgency of a need for the Congress to take measures to avoid the unproductive and unfair dilemma in which we and these witnesses find ourselves. Appropriate committees should expedite development of legislation or other measures sufficient to establish an orderly and fair procedure for securing judicial resolution of contested claims of privilege in Congressional proceedings.

LARRY SMITH.

ADDITIONAL VIEWS OF HON. HOWARD L. BERMAN AND HON. MEL LEVINE

It was our understanding at the full Committee hearing that the majority report would make clear the Committee's intention that the United States attorney who will be responsible for prosecuting this matter is not to base his case in any way on the contention that attorney-client protections may lawfully be disregarded in this Congressional proceeding.

Although the Committee decided not to address the applicability of the privilege to Congressional proceedings in general, we believe that an assertion that such protections do not apply to the Congress would be a truly frightening proposition. If it were to prevail, attorney-client protections could be completely eviscerated, and the values they are designed to serve would be crushed. A confidence can only be secure against disclosure if it is secure everywhere, in every forum where an attempt might be made to extract it.

If a client's confidences and secrets were not secure once given to an attorney, then there would be little meaning to the Fifth Amendment right against compelled self-incrimination, nor to the Sixth Amendment right to counsel, nor to any of the particular component Constitutional guarantees of due process.

Hence, we were pleased that the Committee agreed that the case against these two witnesses must stand or fall on the particular questions they declined to answer, and on the claim that normally applicable attorney-client protections do not support their refusals to testify in these instances.

Indeed, this case demonstrates the urgency of a need for the Congress to take measures to avoid the unproductive and unfair dilemma in which we and these witnesses might find ourselves. Appropriate committees should expedite development of legislation or other measures sufficient to establish an orderly and fair procedure for securing judicial resolution of contested claims of privilege in Congressional proceedings.

HOWARD BERMAN.
MEL LEVINE.

DISSENTING VIEWS OF HON. GERALD B.H. SOLOMON

The action by the Committee on Foreign Affairs to authorize contempt of Congress citations against two American citizens takes what started out at the Subcommittee level as a fishing expedition and raises it to the scale of a full-blown witch hunt. Moreover, the action that was initiated by the Subcommittee on Asian and Pacific Affairs (and now ratified by the full committee) amounts to nothing more than an attempt to interfere in the election process now underway in the Republic of the Philippines.

Let me say at the outset that I have no objection to the Subcommittee (or the full committee) investigating whether or not U.S. foreign assistance money for the Philippines has been diverted by the recipient government for other purposes. But I very strenuously object to the timing of this particular inquiry. By proceeding now, after a Presidential election in the Philippines has been set for February 7, 1986, the Subcommittee and the Committee are embarking on a course the only purpose of which is to create public controversy.

An inquiry of the magnitude that is presently underway will take many weeks, even months or years to complete. The only possible outcome between now and February 7 will be to provide a stimulus for sensational newspaper stories and irresponsible speculation. Once again, we will be treated to the spectacle of trial by headlines. I contend that Congress has more productive things to do.

As already noted, the ostensible purpose of this inquiry is to ascertain whether or not U.S. foreign assistance money for the Philippines has been diverted for other purposes. In the three years that I have been a member of the Subcommittee on Asian and Pacific Affairs, not one shred or evidence has ever been given to the Subcommittee that such diversions have ever taken place. The Subcommittee holds marathon hearings every year in connection with the foreign aid bill, but never once has any evidence been produced to confirm these suggestions.

A series of articles appeared in The San Jose Mercury-News on June 23, 24, and 25, 1985 alleging that President Marcos of the Philippines and members of his family and official entourage have invested large sums of money in real estate transactions in the United States. The question of whether or not some of this money may have been U.S. foreign assistance funds was never mentioned. And when the foreign aid bill came to the floor of the House during the second week in July, the issue of possible foreign aid diversions in the Philippines was never discussed then either.

When the foreign aid bill went to House/Senate conference in early August, the question of what mixture of economic and military assistance to provide to the Philippines became the most contentious issue of the entire conference. An amendment I offered to

provide an adequate level of military assistance, as opposed to frontloading the whole package with Economic Support Funds, received substantial support, particularly from our Senate colleagues, because the delivery and use of military assistance can be much more effectively monitored than can ESF. But again, the issue of foreign assistance diversions was never raised, even by those members who advocated frontloading the package with an inordinate amount of ESF.

My point simply is that allegations concerning investments by President Marcos and his associates have been in the public domain for many months, since even before the year's foreign aid bill came to the floor. And yet all during these protracted proceedings, the issue was never brought up. Not until President Marcos announced plans for an election did the Subcommittee leap into action. And I can only conclude from the timing of this inquest that its sole purpose is to create enough controversy and headlines so as to influence the outcome of that election.

Before moving on to my second principal objection to citing two persons for contempt of Congress, I would like to reiterate that I in no way want to belittle or disparage the importance of this inquiry. But I see no reason why it cannot begin on February 8, the day after the election.

But aside from the whole matter of timing, I also must strongly object to the extraordinary use of Congressional subpoena power in this case. Rather than first meeting with the reporters who have written the articles in The San Jose Mercury-News and, subsequently, other newspapers to learn from them the methodology and sources by which and from which the articles were written, the Subcommittee rushed headlong into issuing subpoenas against individuals who were named in the articles. I find this to be an unconscionable abuse of Congressional subpoena power.

Rather than commencing orderly deliberations and exploring all available avenues for receiving the desired information, the Subcommittee opted to take the quick and easy route by issuing subpoenas. So hasty was the Subcommittee's action that even the Chairman acknowledged having to call in outside consultants for advice on the case. At the insistence of the Subcommittee's ranking Republican member, these outside consultants were removed from the executive sessions that the Subcommittee conducted on this matter.

The subpoenas also placed extraordinary demands on the witnesses who are now being threatened with contempt of Congress citations. The subpoenas issued by the Subcommittee were so sweeping in nature that the witnesses have testified under oath that in order to comply fully with the Subcommittee's demand, they would have to sort through no less than 436 file folders of documents—an amount of material taking up 70 linear feet of file space and adding up to more than 150,000 pages. As if to compensate for months of inactivity and silence on its part, the Subcommittee chose to make up for lost time on this issue and make other people do the work.

In conclusion, the whole pattern that has been established in this case is deplorable. At a time when the House has been considering some of the most important legislation in many years, the Subcom-

mittee, and now the Committee, have decided to cite two Americans for contempt of Congress. This decision has been reached in literally the closing hours of last year's legislative session.

The process has been disorderly and the use of subpoenas has been questionable, but the timing of this whole enterprise leaves little doubt about what its intention is. That this whole affair is designed to affect the outcome of the election in the Philippines, preferably to bring down President Marcos, I haven't the slightest question. The real question is whether or not this is a worthwhile endeavor for the House of Representatives, particularly when it means that American citizens are persecuted in the process.

I am convinced that approval by the full House of Representatives of contempt of Congress citations in this case would constitute a denial of due process of law and be subject to a serious challenge in the federal courts. Moreover, the discredit that some people would like to confer on President Marcos will eventually redound to the discredit of this body.

JERRY SOLOMON.

DISSENTING VIEWS OF HON. TOBY ROTH

The issue before us is a serious one. It must be considered only after careful reflection and discussion. Contempt of Congress is one of the most severe actions this body can pursue. Our motives for action must only reflect the common good of our country. Not individual political advancement. Not unfair manipulation of foreign democracies. Not snap judgments or assumptions. This serious charge must only be pursued if the good of our country is at stake!

I urge my colleagues to oppose the contempt of Congress charge. We can easily be accused of entering court with "unclean hands." I question the motive. Is it solely for publicity? The hearing was rushed through the subcommittee during the busiest legislative time of the House Calendar. Members are deliberating on some of the most pressing domestic issues of our time, tax reform and deficit reduction. Personally, I was very torn between devoting my undivided attention to these hearings and the more serious domestic matters facing our Nation. The executive branch, the leading constitutional foreign policy arm of our Government, did not issue a request for such hearings. Why are we acting with such haste?

My opposition is grounded in the law governing congressional actions. There is no connection between these hearings and our legislative mandate. The subcommittee is fishing for a connection.

A real contempt of Congress charge is valid only if information pertaining to legislative measures is withheld during a hearing. The questions posed by my distinguished colleague, Mr. Solarz, to Mr. Ralph Bernstein and Mr. Joseph Bernstein, don't affect legislation. Therefore no grounds exist to press for contempt of Congress.

Law also states that ample time must be given to the witnesses to prepare testimony. This is clearly not the case. The subpoenas were signed by our committee chairman on December 4th and delivered to the witnesses shortly thereafter. The witnesses appeared before the subcommittee on December 11th, and a contempt of Congress charge was initiated the following day, December 12th. This was hardly a fair amount of time for the witnesses to prepare testimony. Most of us know that witnesses who appear before subcommittee usually are notified weeks in advance if not longer. Why are we rushing?

Finally, I encourage my colleagues to withhold their support for the contempt charge because the proceedings are inappropriate at this time. It is my belief that Mr. Solarz is using the hearings to influence the Philippine elections scheduled for early February. This is an improper use of congressional authority. No further action should be taken on this issue until the elections, which were encouraged by our country, are completed. We've asked for clean and fair elections in the Philippines. Let's not interject ourselves into those elections. Let's not try to influence the Philippine elec-

torate—they can decide for themselves, who they want in government.

I want to remind my colleagues that the contempt of Congress charge is an illustration of the power of Congress. This power was granted by the power of the citizens to be used for the best purpose of our country. Manipulating this power will be a serious error and set a precedent that would have far reaching and potentially dangerous applications to congressional authority in the future.

This resolution is not in the best interest of the Congress nor the citizens of our country. I do not want to be a party—nor should this committee and this Congress be a party, to handing mud pies to the opposition in the Philippines. I urge you to oppose this resolution.

TOBY ROTH.

APPENDIX A

TRANSCRIPT OF TESTIMONY IN WHICH WITNESSES REFUSED TO ANSWER

Mr. SOLARZ. We will now proceed.

Mr. Bernstein, with respect to why the President or Mrs. Marcos—excuse me.

I am advised by counsel I should just let you know what the procedure will be.

Yesterday I told you and the other witnesses that their claim had been overruled and they would be ordered and directed to answer the questions I would subsequently put to them.

To give the witnesses the maximum opportunity to consider their decision, we took two further steps, first we took an overnight recess for the witnesses to consider the situation.

Second, last night House counsel provided counsel for the witnesses with our draft questions for today. I included in the record the memorandum of draft questions provided yesterday.

I will now resume each witness in succession. I repeat, since their objection is overruled and they are now ordered and directed to answer the questions, if they refuse to answer they will be subject to contempt of Congress. To keep matters brief, I hope they will, that they will answer, if they determine not to answer they may simply say something short such as privilege, or same reason.

It will be understood that they stand on all the arguments presented by their counsel yesterday, and that these have been overruled for the reasons stated yesterday.

First we will hear from Mr. Ralph Bernstein.

Mr. Bernstein.

* * * * * * *

CONTINUED STATEMENT OF RALPH BERNSTEIN

Mr. SOLARZ. With respect to President Marcos, do you know either of them?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. Have you met either of them?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. Did you meet either of them on your 1982 trip to the Philippines?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. Have you provided either with real estate investment advice?

Mr. RALPH BERNSTEIN. No.

Mr. SOLARZ. Pardon?

Mr. RALPH BERNSTEIN. No.

Mr. SOLARZ. No.

Have you provided either of them with financial investment advice?

Mr. RALPH BERNSTEIN. No.

Mr. SOLARZ. No.

Have you drafted leases or mortgages for either?

Mr. RALPH BERNSTEIN. No.

Mr. SOLARZ. Have you located real estate properties for either?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. Privileged.

Have you acquired real estate properties for either?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. Privileged.

From your business activity locating and acquiring real estate properties and so on, do you know if either has any interest in the Crown Building?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. From your business activity, do you know if either has any interest in the Harold Center?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. Privileged.

Do you know the origin of any funds for purchase of any interest in Crown Building or Harold Center?

Mr. RALPH BERNSTEIN. No, as far as I can remember the answer is no.

Mr. SOLARZ. From your business activities do you know any investments by the Marcos family in the United States?

Mr. RALPH BERNSTEIN. Privileged.

Mr. SOLARZ. What position do you hold in Canadian Land Company?

Mr. RALPH BERNSTEIN. At the current time I don't hold any position.

Mr. SOLARZ. Did you ever hold a position?

Mr. RALPH BERNSTEIN. Yes.

Mr. SOLARZ. What was it?

Mr. RALPH BERNSTEIN. Managing Director.

Mr. SOLARZ. Managing Director.

Do you know who the company's officers are?

Mr. RALPH BERNSTEIN. I cannot recall.

Mr. SOLARZ. Do you know who they were at the time you were a managing director?

Mr. RALPH BERNSTEIN. No, I cannot recall.

Mr. SOLARZ. Can you please speak into the microphone?

Mr. RALPH BERNSTEIN. I cannot recall.

Mr. SOLARZ. Do you know who the shareholders of Canadian Land are?

Mr. RALPH BERNSTEIN. I cannot recall.

Mr. SOLARZ. You have no idea?

Mr. RALPH BERNSTEIN. As far as I can recall, I don't have any idea.

Mr. SOLARZ. Absolutely none?

Mr. RALPH BERNSTEIN. No.

Mr. SOLARZ. How did you become a managing director?

Mr. RALPH BERNSTEIN. My brother appointed me a managing director.

Mr. SOLARZ. Pursuant to what authority did he appoint you?
Mr. RALPH BERNSTEIN. I really don't know.
Mr. SOLARZ. He just appointed you, and then for how long were you the managing director?
Mr. RALPH BERNSTEIN. I am not really sure.
Mr. SOLARZ. Are you a director—you are no longer a director of the Canadian Land Company?
Mr. RALPH BERNSTEIN. No.
Mr. SOLARZ. Thank you very much.
Mr. RALPH BERNSTEIN. Thank you.
Mr. SOLARZ. I now call Joseph Bernstein.

* * * * * * *

CONTINUED STATEMENT OF JOSEPH BERNSTEIN, BERNSTEIN, CARTER AND DEYO, ESQUIRE

Mr. SOLARZ. Mr. Bernstein, with respect to either President Marcos or Mrs. Marcos, do you know either of them?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Can you please speak into the microphone.
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Have you met either of them?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Have you ever had any business dealings with either?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Have you located any real estate properties for either?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Have you acquired any real estate properties for either?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Have you provided any real estate or financial advice to either?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Have you drafted any leases or mortgages for either?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Who appointed you as a director of Canadian Land Company?
Mr. JOSEPH BERNSTEIN. I think it must have been some shareholder resolution but I don't recall.
Mr. SOLARZ. It was a shareholder resolution?
Mr. JOSEPH BERNSTEIN. I am not sure. That is my best guess.
Mr. SOLARZ. Who were the shareholders of Canadian Land Company at the time you were appointed a director?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. When did the shareholders of Canadian Land Company first become shareholders of it?
Mr. JOSEPH BERNSTEIN. Privileged.
Mr. SOLARZ. Why was the name of Lastura NV changed to Canadian Land Company?
Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Was there any change of ownership or company officials when the name was changed?

Mr. JOSEPH BERNSTEIN. On change of ownership, privileged.

On change of offers, I do not believe so.

Mr. SOLARZ. Are any shareholders Filipino?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Did any money to purchase or renovate the Crown Building come from the Philippines?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Does Imelda Marcos have any interest, direct or indirect interest in Lastura NV or Canadian Land Company?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Does Ferdinand Marcos have any interest, direct or indirect, in Lastura NV or Canadian Land Company?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Have you acted directly or indirectly for any other principal in your capacity as director of Canadian Land Company?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Does Imelda Marcos have any direct or indirect financial interest in the Crown Building?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Does Ferdinand Marcos have any direct or indirect interest in the Crown Building?

Mr. JOSEPH BERNSTEIN. Privileged.

Mr. SOLARZ. Has anyone asked you not to cooperate with our inquiry?

Mr. JOSEPH BERNSTEIN. No, sir.

Mr. SOLARZ. Are you at all concerned if you did cooperate with our inquiry that you might be the subject of physical intimidation?

Mr. JOSEPH BERNSTEIN. I would decline to answer that question.

Mr. SOLARZ. On what grounds?

Mr. LAZARUS. I think the answer is fairly clear, Mr. Chairman.

Mr. SOLARZ. We are now in executive session. I ask the question because the other witnesses that have been subpoenaed before this committee have through counsel told us that they fear there could be threats to their families in the Philippines.

Mr. LAZARUS. Would you repeat the question, please.

Mr. SOLARZ. Do you have any reason to believe that if you were to cooperate before this committee, you or anyone in your family would be the subject of physical intimidation?

Mr. JOSEPH BERNSTEIN. I suspect it is possible.

Mr. SOLARZ. Why?

Mr. JOSEPH BERNSTEIN. I read the newspapers, I suppose it is possible.

Mr. SOLARZ. Who? Is that why you are not cooperating with this committee?

Mr. JOSEPH BERNSTEIN. No, sir.

Mr. SOLARZ. And who—from where would these acts of intimidation come?

Mr. JOSEPH BERNSTEIN. I would think that if—this is totally hypothetical, but if I was identified as being involved in any capacity it could come from either side of the government, opposition just as strongly as current.

Mr. SOLARZ. Is it possible that any of the principals who have declined to identify because of the assertion of the privilege might seek to——

Mr. JOSEPH BERNSTEIN. No, sir.

Mr. SOLARZ. You have no concern that way?

Mr. JOSEPH BERNSTEIN. No, sir.

Mr. SOLARZ. I see.

Mr. GEJDENSON. Will the gentleman yield?

Mr. SOLARZ. Certainly, be happy to yield.

Mr. GEJDENSON. Which government was the gentleman referring to?

Mr. JOSEPH BERNSTEIN. The Government of the Philippines.

Mr. SOLARZ. Do you think there is any threat to the members of this subcommittee or to the chairman as a result of the pursuit of this inquiry?

Mr. JOSEPH BERNSTEIN. I don't think so, but I don't have any knowledge to make that determination.

Mr. SOLARZ. I hope not.

Did the stockholders meet—let me just say that during the recess if I should vanish somewhere in Manila, I trust that the Members will carry on in the spirit——

Mr. GEJDENSON. The minority would be happy to carry on.

Mr. UDALL. At what point could I resign from the subcommittee?

Mr. SOLARZ. Let me say if I do disappear, it may be—I suggest you also find out who accompanied me on this trip.

Mr. SOLOMON. Mr. Chairman, if you disappear, I assure you I had nothing to do with it.

Mr. SOLARZ. Finally, did stockholders meet and ask you to resign as a director of Canadian Land Company?

Mr. JOSEPH BERNSTEIN. I don't know, the official records of the company must have some shareholder resolution. I don't know if stockholders met or anything like that.

Mr. SOLARZ. Why did you resign?

Mr. JOSEPH BERNSTEIN. I was asked to and I provided resignation documents.

Mr. SOLARZ. Thank you very much.

Mr. LAZARUS. If I could just say on the physical safety point, I think that your situation could be different from these people's situation regardless of what they may have said, and I think it is something with which we need to bear in mind.

Mr. SOLARZ. Thank you.

Mr. Deyo.

APPENDIX B

Memorandum Opinion of General Counsel to the Clerk of the House of Representatives on Attorney-Client Privilege

Office of the Clerk,
House of Representatives,
Washington, DC, December 11, 1985.

Memorandum to: The Honorable Stephen J. Solarz.
From: Steven R. Ross, General Counsel to the Clerk; Charles Tiefer, Deputy General Counsel to the Clerk.
Subject: Anticipated Claim of Attorney-Client Privilege.

It is anticipated that the Subcommittee will be confronted with a claim of attorney-client privilege during the conduct of today's hearing. This memorandum will discuss several aspects of that claim and will provide the Subcommittee with the views of this office on the relevant Congressional and judicial precedents which the Subcommittee may wish to consider in rendering its determination on the applicability of the asserted privilege.

Rule X(i) of the Rules of the House of Representatives provides the Committee on Foreign Affairs with legislative and oversight jurisdiction over matters related to the international relations of the United States, including the relations of the United States with foreign nations generally, foreign loans, intervention abroad and declarations of war, measures to foster commerical intercourse with foreign nations and to safeguard American business interests abroad, protection of American citizens abroad, various international organizations and other related matters. Rule X(i), Rules of the House of Representatives, reprinted at 678 Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 98-277, 98th Cong. 2d Sess. 358 (1985) (Rules of the Ninety-Ninth Congress).

The Rules of the Committee on Foreign Affairs devolve upon the Subcommittee specific responsibility with respect to foreign assistance. The Subcommittee is charged with the jurisdictional responsibility concerning the annual legislative programs of foreign assistance for its region, the ongoing oversight of all foreign assistance activities affecting its region and is required to report to the full Committee, on an annual basis, its findings and conclusions, including specific legislative recommendations, with respect to foreign assistance activities of the United States. Additionally, the Rules of the Committee give the Subcommittee jurisdiction on matters affecting the political relations between the United States and nations within the region, certain aspects of disaster relief, loan and other financial relations within the region, particular responsibility in the area of arms sales, and general elements related to the development of the foreign policy to be pursued with respect to na-

tions within the region. Rule 14, Rules of the Committee on Foreign Affairs, reprinted in Rules Adopted by the Committees of the House of Representatives, Rules Committee Print, 99th Cong.

Pursuant to these jurisdictional grants the Subcommittee has commenced an inquiry into the various allegations that have surfaced in the press and elsewhere with respect to large scale real estate investments purportedly made by or on behalf of the Marcos family. The Subcommittee believes that the nature and extent of real estate investment in the United States by governmental officials in nations receiving vast amounts of American support may be instructive to Congressional consideration of pending and future foreign assistance decisions, as well as other aspects of our relations with the Philippines and the region in general. The desirability of enacting certain mandatory disclosure laws is also under consideration by the Subcommittee. Clearly, the information sought by the Subcommittee's recent subpoenas is pertinent to these valid legislative inquiries.

Counsel for certain of the witnesses have advised the Subcommittee that they do not believe that their clients can comply with a significant portion of the documentary aspect of the subpoenaes and have further indicated that they expect to assert a privilege against answering many of the questions which the Subcommittee is likely to put to their clients. By memorandum, and in discussion, counsel for the witnesses have presented the Subcommittee with their legal assertions. Presumably these points will be repeated and supplemented during the course of the Subcommittee's hearing. To assist the Subcommittee in its consideration of the claim of privilege there follows a discussion of the salient points of the assertion of privilege.

Essentially counsel for the witnesses present three arguments. The first is the question of the time afforded to respond to the subpoenaes. Secondly, is the claim that the common law privilege of attorney-client secrecy prevents the witnesses from providing the Subcommittee with the information it seeks. Thirdly, it is submitted to the Subcommittee that the potential application of certain disciplinary rules of the bar serve to put the witnesses at risk of disbarment or other disciplinary action, if they reveal client confidences in response to the Subcommittee's subpoena. This office believes that all three grounds proffered do not serve to excuse the witnesses from fully complying with the Subcommittee's subpoena and do not serve as a valid basis for the witnesses to refuse to answer pertinent questions posed by the Subcommittee.

The time which a Congressional committee must afford to someone to comply with its subpoenaes is a function of the facts present in each individual case. Although the Congress should not be deterred in obtaining the information that it needs in furtherance of its legislative responsibilities, individuals required to provide this informaiton should be given a reasonable period of time to prepare for and attend a Congressional hearing. In the rare instances in which this question has been given judicial attention the extreme flexibility of a Congressional committee to set the schedule for an individuals appearance has been recognized. Thus in *United States* v. *Kamin,* 136 F. Supp. 791, the court recognized that a one-day notice was sufficient for a witness who came to the hearing and

then refused to answer questions. Although the defendant was acquitted on other grounds, the Court specifically held that the one-day notice was sufficient. Less extreme is the Supreme Court's determination in *Wilkinson* v. *United States,* 365 U.S. 399 (1961), that notice of one week was sufficient to compel someone to attand a field hearing. As a general rule, House Committees endeavor to provide individuals with notice of several days to attend a hearing. The time constraints relevant to a production of documents does present different questions. Again, the Subcommittee enjoys a wide degree of latitude in determining whether or not a witness is facutally incapable of complying with a document demand. In reaching this conclusion, the reason for delay should be taken into account by the Subcommittee. In this instance, the delay apprars to be a function of the self-imposed requirement of multiple review procedures to determine whether or not specific documents are covered by the privilege. Therefore, the Subcommittee's determination of reasonableness as to time may turn, in part, on its determination of the applicability of the privilege claim. We will, therefore proceed to discuss that claim.

It is anticipated that the claim of attorney-client privilege will be asserted with respect to requests for corporate business records and with respect to various business transactions, i.e, real estate purchases, which these witnesses conducted on behalf of other individuals. The nature of the subject matter, relating to real estate transactions rather than the provision of legal services render, the claim of privilege unpersuasive. Claims of attorney-client privilege have been rejected by the judiciary with respect to virtually identical questions in the recent past. Moreover, the general rule is that attorney-client privilege can not be claimed as a matter of right before a legislative committee. This has been the traditional determination by both the House and the Senate and, in fact, parallels the treatment afforded by the English Parliament under the English law of both attorney-client privilege and parliamentary prerogatives.

The attorney-client privilege has developed as a function of common law tracing its roots in the English barrister's code of honor and the notion that an English gentleman would not reveal secrets. As recognized by courts in the United States, the privilege attaches to a client's communications seeking legal advice from a professional legal advisor acting in that capacity, and applies only to communications regarding action in that capacity. "Thus, where the attorney acts as business advisor or collection agent, gives investment advice, or handles financial transportation for his client, the communications between him and his client are not protected by the privilege. In re *Edwin Shapiro,* 381 F. Supp. 21 (N.D. Ill. 1974) (footnotes omitted).

In a recent case, documents subpoenaed from an attorney regarding real estate property purchases. The attorney had represented two undisclosed principals. The subpoena required all the business records of the pertinent real estate company, all the records concerning the purchase and sale of the properties, and "directed(ed) petitioner (that is, the attorney) to testify before the grand jury regarding his knowledge of business affairs of XYZ Realty, Inc., (the pertinent real estate company). In re *Application of John Doe, Esq.,*

603 F. Supp. 1164 (E.D.N.Y. 1985). Among the specific questions that were to be answered in that questioning was one parallel to the key one for the Subcommittee's hearing: "Who founded XYZ; a) How much case was put into the corporation; b) Who funded the corporation." Id. at 1167 n.1. The district court held that no attorney-client privilege applied: the document "categories are unprivileged because they related to business, not legal advice," Id. at 1167, while the questions "appeared to seek answers concerning only business advice when, though perhaps intended to be private, most certainly were not privileged." Id.

The similarity of the claims rejected earlier this year by the judiciary in above-cited case and the claims asserted here make that decision particularly instructive.

Not only is it appropriate for this Subcommittee to determine, as had the court in New York, that business information of this nature can not be cloaked in the protective garb of confidential attorney-client communication, but it is also appropriate for this Subcommittee to reject, as other Congressional subcommittees have the applicability of the attorney-client privilege to legislative proceedings.

As Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, the oracle to be consulted in determining questions of English parliamentary procedure, specifically notes:

> A witness is, however, bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has taken an oath not to disclose the matter about which he is required to testify, or because the matter was a privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client . . . some of which would be sufficient grounds of excuse in a court of law.

Erskine May's Treatise at 746–47, Twentieth Edition (1983).

Consistently, Congressional committees have felt enabled to reject the applicability of claims of attorney-client privilege. Thus in the nineteenth century, notable investigation into the financing of the Union Pacific Railroad and the activities of the Credit Mobiler, the House Committee held Mr. Stewart in contempt notwithstanding his assertion of attorney-client privilege. See *Stewart* v. *Blaine*, 1 MacArthur 453 (D.C. 1874) and Eberling, Congressional Investigations (1928), 349–50.

In recent years, the Subcommittee on Investigations and Oversight of the Committee on Energy and Commerce has on a number of occasions rejected claims of attorney-client privilege. See, Attorney-Client Privilege, Memoranda Opinions of the American Law Division, Library of Congress, Committee Print 98–I, (98th Cong. June 1983). See also Hearings, International Uranium Cartel, before Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess Vol. 1 (1977).

Both the House and the Senate have failed to adopt proposals to specifically incorporate a privilege respecting attorney-client confi-

dences in their Rules. See Sen. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954), H.R. Res. 178 (84th Cong., 1st Sess.)

As demonstrated from the discussion above, the House has taken a limited view as to the applicability of attorney-client privilege. It has entertained, as a matter of discretion claims to that effect. However, where the House Subcommittee has determined that the legislature need for the information to facilitate the conduct of the public business requires productions such production has been required. In this situation, the underlying claim is attenuated by the "business" nature of the information sought. It is, therefore, entirely reasonable and consistent with the precedents of the House and the appropriate judicial precedents for the Subcommittee to reject the claim of privilege.

Additionally, counsel for the witness seeks to present a somewhat district argument under the Canons of Ethics applicable to the witnesses as members of the Bar. Essentially, this argument entails the notion that the witnesses would be subject to disciplinary proceedings based on their divulging of client secrets to the committee. The claim is that the Ethics Code only permits disclosure upon a specific court order. The Code actually permits disclosure where required by law or court order. It is designed to assure that a lawyer will take steps to assure that his clients confidence is respected to a proper degree but does recognize that the protection is not absolute. In the Congressional context the ruling by the Subcommittee chair that the privilege will not be accepted is the legal and functional equivalent on a legal requirement or a court order. Failure to answer at that point constitutes a criminal violation. Disclosure at that stage does not violate the Canons of Ethics nor the Bar Code of any jurisdiction.

APPENDIX C

MEMORANDUM OPINION OF GENERAL COUNSEL TO THE CLERK OF THE HOUSE OF REPRESENTATIVES ON VOLUNTARINESS OF WITNESS COMPLIANCE

OFFICE OF THE CLERK,
HOUSE OF REPRESENTATIVES,
Washington, DC, December 11, 1985.

Memorandum to: Subcommittee on Asian and Pacific Affairs.
From: Steven R. Ross, General Counsel to the Clerk; Charles Tiefer, Deputy General Counsel to the Clerk.
Subject: Whether Compliance with Ruling of Subcommittee Chairman is "Voluntary."

Counsel for the witnesses in this investigation has raised the issue that "the witnesses must resolve all uncertainties concerning confidentiality in favor of asserting the privilege . . . because an attorney's voluntary production . . . constitutes a complete and binding waiver of the privilege;" counsel further contends that "Because 'voluntary' disclosure is that which has not been judicially compelled * * * *disclosure pursuant to a congressional subpoena could be considered voluntary.*" Memorandum of Dec. 10, 1985, at 9–10 (emphasis added and citations omitted).[1]

This issue matters particularly because these witnesses will have to decide, if the Chair overrules their objections, whether they must answer, or whether they are still acting voluntarily—and hence can or should press their claims further.

Counsel's contention that disclosure pursuant to Congressional direction is "voluntary" is without merit. It shows a fundamental lack of understanding of the basic parallel between how objections are presented to, and ruled upon, by the judicial and legislative branch proceedings. In the judicial proceeding—or in administrative proceedings, like IRS summonses, enforced through a civil judicial proceeding—a witness who has an objection to providing documents or information may withhold those documents or information, present that objection, and await the ruling of the Court. Depending on one's choice of vocabulary, production pursuant to subpoena or summons prior to that ruling may be considered "voluntary," but once the objection is overruled, and the witness must

[1] The single case to which counsel cited, concerning disclosure being "voluntary" when not judicially compelled (a one-sentence footnote in *Chubb Integrated Systems* v. *National Bank of Washington*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984)), has nothing to do with the Congressional context, says nothing about Congressional subpoenas, and actually does not concern even a judicial contempt situation, but merely a discovery dispute concerning voluntary permission given to opponents in litigation to inspect files. It clearly is without the slightest intention of being considered an obiter dicta about contempt of Congress. It contrasts with the Supreme Court and D.C. Circuit cases discussed below addressing the core realities of Congressional investigation.

cease withholding, production and answering clearly are not voluntary.

The procedure in the legislative branch proceedings parallels this, as described by the Supreme Court:

> Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under § 192. Thus, if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question even though the objection might actually be without merit. In such an instance, the witness' refusal to asnser is not contumacious, for there is lacking the requisite criminal intent. Or *the committee may disallow the objection* and thus give the witness the choice of answering or not. Given such a choice, the witness may recede from his position and answer the question. *And if he does not then answer, it may fairly be said the foundation has been laid for a finding of criminal intent to violate § 192.*

Quinn v. *United States,* 349 U.S. 155, 165–66 (1955) (emphasis supplied). In short, once the Chair in a legislative proceeding overrules the objection, the period when disclosure would be "voluntary" is past, just as surely as that period is past in a judicial proceeding once the Court overrules the objection.

In that regard, it is well to note that such memoranda as the witnesses' law firm has provided, or other legal advice, may well assist the witness in presenting an objection to the Chair. However, once the Chair overrules an objection, compliance is not voluntary; such memoranda do not excuse noncompliance. Again, as the Supreme Court explains,

> There is no merit in appellant's contention that he is entitled to a new trial because *the court excluded evidence that in refusing to answer he acted in good faith on the advice of a competent counsel.* The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. *Armour Packing Co.* v. *United States,* 209 U.S. 56, 85. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U.S. 20, 49.

Sinclair v. *United States,* 279 U.S. 263, 299 (1929) (emphasis supplied).

In fact, the constitutional imperative that Congress obtain the information it requires is so strong that there is no place for a doctrine that by providing information to Congress when a claim of privilege has been validly overruled, the privilege is waived for some other context. As the D.C. Circuit recently explained, in rejecting the contention that providing documents to Congress would

waive the privilege provided by Exemption Five of the Freedom of Information Act:

> We do not find it necessary to explore fully to what extent . . . disclosure might affect the applicability of Exemption Five, under doctrines of waiver . . . for it is evident that the disclosure to the Congressman could not have had that consequence.
>
> * * * [A]n interpretation [that] every disclosure to Congress would be tantamount to a waiver of all privileges and exemptions [would meant that] executive agencies would inevitably become more cautious in furnishing sensitive information to the legislative branch, a development at odds with public policy which encourages broad congressional access to governmental information. For these reasons, we conclude that . . . [when Congress] actually does receive such information pursuant to [section 5(c) of the act] (whether in the form of documents or otherwise), *no waiver occurs of the privileges and exemptions* which are available to the executive branch under the FOIA with respect to the public at large. Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibility effectively. . . . [A waiver rule] would tend to "dry up" the executive flow of information to the Congress since it would strip information of whatever privilege it might otherwise possess.

Murphy v. *Department of the Army*, 613 F.2d 1151, 1155–56, 1158 (D.C. Cir. 1979).

In sum, a witness who withholds information while presenting his objection, and fortifies that objection with legal arguments, and insists on the objection being overruled and receiving an order from the Chair before providing the information, has done what he can. At that point, the contention that the witness is acting "voluntarily" simply is without merit, for refusing the order of the Chair means that "the foundation has been laid for a finding of criminal intent to violate § 192." *Quinn* v. *United States*, supra.

APPENDIX D

MEMORANDUM ON BEHALF OF THE WITNESSES

Memorandum to: Hon. Stephen J. Solarz, United States House of Representatives.
From: C. King Mallory, III, Stuart E. Eizenstat.
Date: December 10, 1985.

WITNESSES' ETHICAL OBLIGATIONS ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO SUBCOMMITTEE'S SUBPOENAS

We have been retained by Joseph Bernstein, Ralph Bernstein, and William B. Deyo, Jr., in connection with the subpeonas duces tecum that have been issued to them by the Foreign Affairs Committee. This memorandum explains why we have advised our clients that they are obligated not to respond fully to the Subcommittee's subpoenas. Although our clients intend to cooperate with the Subcommittee to the extent that they can do so consistent with their professional obligations, they are simply unable to comply completely with the particular subpoenas issued by the Subcommittee without violating those obligations.

Joseph Bernstein and William Deyo are members of the New York law firm of Bernstein Carter & Deyo. Ralph Bernstein is a former employee of the law firm and is now an officer of New York Land Co., a client of the firm.

Joseph Bernstein and William Deyo were served with the subpoenas at their law firm on December 5, 1985; Ralph Bernstein was served yesterday. The subpeonas seek the witnesses' oral testimony and production of "[a]ny and all documents reflecting ownership, and its value" of eleven listed corporations and real properties, as well as "any and all documents concerning purchases or other transactions on behalf of Philippine or Philippine-American principals."

We have been advised that, prior to the issuance of the subpoensas, the Subcommittee staff tried to contact Joseph Bernstein by telephone, on November 25 and 26. Unfortunately, Mr. Bernstein and his brother were in Israel attending their father's burial during the two days in which the contacts were attempted. As far as they know, no attempt was made to contact Mr. Deyo or Mr. Ralph Bernstein until they were served with the subpoenas. In anticipation of receiving the subpoena, which was not formally served upon him until yesterday, Ralph Bernstein voluntarily delayed returning to Israel to attend to his father's affairs in an effort to accommodate the Subcommittee's schedule.

Full compliance with the subpoenas would require the law firm to produce a massive amount of its client files and to answer question concerning the legal advice given to clients with respect to

those and other matters. In this connection, Bernstein Carter & Deyo is a law firm formed in 1981 by three attorneys formerly associated with Cahill Gordon and Reindel, Willkie Farr & Gallagher, and Rosenman, Colin, Freund, Lewis & Cohen. These three lawyers had developed well-recognized expertise in the tax and corporate aspects of foreign investment in the United States. A common incident of this type of practice is developing the expertise to accommodate clients' interest in maintaining the confidentiality of their investments. The firm represents clients from many nations in connection with their business in the United States and elsewhere.

Because the subpoenas seek information that was gained during the course of the firm's representation of its clients, the subpoenas seek testimony and documents that the witnesses are duty-bound not to reveal. This obligation is intensified by the legitimate interests of many of the firm's clients in maintaining the confidentiality of both the fact and nature of the firm's representation of them. As with any other law firm, the confidential information gained in the course of their representation extends beyond the clients' identities to include many other aspects of the representation.

The discussion below places particular emphasis upon the confidentiality of the identities of the firm's clients because protecting that confidentiality is critically important to the firm's clients, and because their identities would necessarily be revealed by full compliance with the subpoenas. Moreover, since you have questioned whether the identities of the firm's clients should be considered confidential in connection with the witnesses' testimony, we have endeavored to show why those identities, as well as all information related to the performance of legal services for the firm's clients, are absolutely protected from disclosure in this context.

I. NONDISCLOSURE UNDER THE CODE OF PROFESSIONAL RESPONSIBILITY

There are two sources of the witnesses' duty not to disclose most of the information—including their clients' identities—sought by the subpoenas. The first is the Code of Professional Responsibility, which has been codified in the District of Columbia as Appendix A to the District of Columbia Court Rules, and in New York in 29 McKinney's Consol. Laws of New York, Judiciary Law. Disciplinary Rule 4-101 of the Code, entitled "Preservation of Confidences and Secrets of a Client," prohibits a lawyer from revealing the "confidences" or "secrets" of his clients unless the client consents or unless required to do so by law or court order. DR 4-101(B)(1), (C)(2). "Confidences" and "secrets" are broadly defined to include all information which the client wishes the lawyer to hold confidential, or which could prove embarrassing or highly detrimental to the client if disclosed. The penalties for violating these mandatory rules are severe: the offending lawyer is subject to disqualification, disciplinary action or even disbarment. See *Financial General Bankshares, Inc.* v. *Metzger*, 523 F. Supp. 744, 763 (D.D.C. 1981) (citations omitted).

DR 4-101 has been interpreted in a way that absolutely prohibits the subpoenaed witnesses from disclosing most of the information that the subpoenas seek. The interpretations applicable here are reflected in the opinions issued by the District of Columbia and

New York Bars, the most compelling of which is Legal Ethics Committee Opinion No. 124 of the District of Columbia Bar. In that opinion, a copy of which is attached, the bar committee was asked to answer a series of questions concerning a law firm's obligation to reveal its clients' identities during an IRS audit. The opinion held, in the first instance, that "whenever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client 'confidence' or 'secret' " accorded the protections of DR 4-101. The opinion also states that any doubt in making these determinations should be resolved in favor of respecting the confidentiality of the client's identity. See also D.C. Bar Legal Ethics Opinion No. 99, January 28, 1981.

Acknowledging that DR 4-101 authorizes disclosure of confidential information "when required by law or court order," Opinion No. 124 noted that the lawyer should not comply with a summons for protected information until all avenues of appeal were exhausted:

> However, even if the IRS does issue a summons, the inquirer's firm may not automatically comply with it. Rather, the firm remains under an ethical obligation to resist disclosure until either the consent of the clients is obtained or the firm has exhausted available avenues of appeal with respect to the summons.

Id. at 207 (footnote omitted); accord Committee on Professional Ethics of the New York State Bar Association, Opinion No. 528 (court orders that are subject to reversal—or modification—on appeal do not mandate immediate compliance with directive to reveal information entrusted to lawyer in confidence). The opinion goes on to state that, only after exhausting available appeals of a court order to reveal the identities of its clients, can the lawyer ethically comply with such an order.

These ethical constraints preclude full compliance with the Subcommittee's subpoenas. The subpoenaed witnesses have a professional obligation to decline to reveal any of their clients' confidences and secrets even in reponse to congressional subpoenas. Because of the nature of the witnesses' representation of their clients and their instructions concerning that representation, those secrets include the very identity of the clients.

These circumstances involve an obvious conflict between the subpoenaed witnesses' professional obligations to their clients and the objectives of the Subcommittee reflected in the broad wording of the subpoenas. Unfortunately, the witnesses are compelled by the ethical constraints discussed above to resolve that conflict by subjecting themselves to a possible contempt citation. In the judicial context, this dilemma would not occur, because a final court order would relieve the law firm of its professional obligation to maintain client confidences and secrets. In the absence of such an order, we respectfully request the Subcommittee to withdraw the issued subpoenas, and to attempt to obtain the information that it seeks from others who are not bound by professional obligations of confidentiality.

II. NONDISCLOSURE UNDER THE ATTORNEY-CLIENT PRIVILEGE

The witnesses are further precluded from complying fully with the subpoenas by the attorney-client privilege. This evidentiary privilege is applicable in the legislative, as well as the judicial, context. See, e.g., *MacCracken* v. *Jurney,* 294 U.S. 125 (1935).

The breadth of the subpoenas and the complexity of the witnesses' legal representation of their clients make it impossible to determine, within the time frame allowed by the Subcommittee, whether all documents and information responsive to the subpoenas are protected from disclosure by the attorney-client privilege. In these circumstances, the witnesses must resolve all uncertainties concerning confidentiality in favor of asserting the privilege on behalf of their clients. This is so because an attorney's voluntary production of privileged documents constitutes a complete and binding waiver of the privilege as to those documents. In re *Grand Jury Investigation of Ocean Contracts,* 604 F.2d 672, 674 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979). Moreover, voluntary production of those documents implies a waiver of the privilege as to all communications on the same subject. *Weil* v. *Investment/Indicators, Research & Management, Inc.,* 647 F.2d 18, 24 (9th Cir. 1981); *Chubb Integrated Systems* v. *National Bank of Washington,* 103 F.R.D. 52, 63 (D.D.C. 1984). Because "voluntary" disclosure is that which has not been judicially compelled, *Chubb,* 103 F.R.D. at 63, disclosure pursuant to a congressional subpoena could be considered voluntary.

This risk of sacrificing the privilege is all the more daunting because it can occur inadvertently.

> This Court cannot * * * conclude that inadvertent disclosure may be grounds to protect the waiver that otherwise occurs upon voluntary production of documents. We observe, instead, that the weight of authority recognizes that *waiver can occur through inadvertence.*

Id. at 67 (emphasis added, citations omitted). Thus the hurried or uninformed disclosure of material in response to the Subcommittee's subpoenas could result in the inadvertent waiver of the attorney-client privilege in all other contexts and for all other purposes.

The general rule is that a client's identity is not protected by the attorney-client privilege. *United States* v. *Liebman,* 742 F.2d 807, 809 (3rd Cir. 1984). The weight of authority makes clear, however, that communications regarding a client's motive in seeking legal advice are privileged. In re *Grand Jury Proceedings (Schofield),* 721 F.2d 1221, 1222 (9th Cir. 1983); *Baird* v. *Koerner,* 279 F.2d 623, 630 (9th Cir. 1960). Where disclosure of a client's identity would ultimately lead to disclosure of the client's motive for seeking legal advice, the client's identity is also privileged. *Salas,* 695 F.2d at 362; In re *Grand Jury Proceedings (Jones),* 517 F.2d 666, 674–75 (5th Cir. 1975).

In *Jones,* for example, the court recognized that the clients of the subpoenaed attorneys had strong motives for seeking legal advice and for expecting that their names would be kept confidential. In that context, the court held that the attorney-client privilege prevented disclosure of the clients' motive and their identities, because

the latter protection was necessary to preserve the confidentiality of the motive. Id.

Since many of the subpoenaed witnesses' clients sought the services of Bernstein Carter and Deyo with the expectation that their motives, as well as their identities, would be maintained in confidence, any information or documents that would reveal identities or motives of clients are protected by the attorney-client privilege. Therefore, the disclosure of the identities of the clients would necessarily reveal their motivations for seeking the services of the firm in violation of the attorney-client privilege.

In a judicial context, the normal procedure for resolving claims of privilege is to submit the issue to a court in camera for its determination. In re *Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982). That option, unfortunately, is not available here, because disclosure to the Subcommittee would be both public and irrevocable.

In addition, the attorney-client privilege attaches to communications regarding transactions in which several of the firm's clients participated and as to which they had a "community of interests." The community of interest doctrine brings within the attorney-client privilege all confidential communications among attorneys and their clients where the clients have identical legal interests with respect to the subject of a communication between the attorney and the client. *United States* v. *Osborn*, 409 F. Supp. 406, 409–10 (D. Or. 1975), aff'd in part, rev'd in part, 561 F.2d 1334 (9th Cir. 1977); *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1174–75 (D.S.C. 1974). To the extent that the subpoena seeks disclosure of confidential documents between clients of the firm, among whom there exists a community of interests, the documents are protected by the attorney-client privilege.

III. CONCLUSION

The sheer volume of documents which must be reviewed in order to comply with the subpoenas precludes full compliance within the unreasonably short time period allowed. There are over 436 file folders, totalling over 70 linear feet of files, which contain in excess of 150,000 pages. It is simply impossible even to examine all of this material, much less to determine in each instance whether each item is protected as a client confidence or secret, or under the attorney-client privilege. The problem is made even more intractable because any voluntary disclosure of privileged documents, even if inadvertent, may constitute a general waiver of all related communications.

With respect to testimony, we frankly anticipate that the witnesses will be able to provide very little information. Specifically, the witnesses will only answer those questions as to which it is plainly apparent that disclosure of confidential information will not result. If there is any uncertainty whether answering the question will disclose a client secret or privileged information, the witnesses will be compelled to refrain from answering.

We reaffirm our clients' interest in cooperating in the investigation and providing the Subcommittee with the information to which it is legally entitled. We hope that you will understand our

clients' desire to assist you and the Subcommittee in a manner consistent with their professional and legal obligations and in a manner that does not expose them to professional or pecuniary sanctions.

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